

Exhibit E

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2 *** C O N F I D E N T I A L ***

3 AMERICAN ARBITRATION ASSOCIATION

4 NEW YORK, NEW YORK - COMMERCIAL RULES

5 -----x

6 NOEL M. WIEDERHORN, MD o/b/o

7 NOEL M. WIEDERHORN, MD IRA

8 ROLLOVER ACCOUNT,

9 Claimant,

10
11 vs.

Arbitration No.

12 13 148 Y 02937 08

13 J. EZRA MERKIN AND GABRIEL CAPITAL

14 CORPORATION,

15 Respondents.

16 -----x

Willkie Farr & Gallagher, LLP

17 878 Seventh Avenue

New York, New York

18 December 4, 2009

9:37 a.m.

19
20 B E F O R E:

21 DAVID E. ROBBINS, ESQ. - The Chairman

22 THOMAS J. FLEMING, ESQ. - Panel Member

23 STEPHEN W. GREINER, ESQ. - The Panel Member

24
25 Amy Klein-Campion - Hearing Reporter

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<p style="text-align: right;">605</p> <p>1 - Merkin - Cross - Confidential</p> <p>2 so unlikely that Mr. Madoff ever said --</p> <p>3 Mr. Madoff would not talk about exercising calls</p> <p>4 ever. He certainly wouldn't be a person who</p> <p>5 would misstate the exercise of a call when one</p> <p>6 was short and not long.</p> <p>7 But it seems to get to the basic</p> <p>8 lack of options experience or lack of options</p> <p>9 expertise of the reporter.</p> <p>10 Q. And --</p> <p>11 A. The author of the article.</p> <p>12 Q. Excuse me?</p> <p>13 A. The author of the article.</p> <p>14 Q. Can you exercise a call when you're</p> <p>15 short it?</p> <p>16 A. You cannot.</p> <p>17 Q. You were asked a lot of questions by</p> <p>18 Mr. Bamberger about the lack of volatility, the</p> <p>19 results, and Mr. Teicher, and so on and so</p> <p>20 forth.</p> <p>21 What did you do to satisfy yourself</p> <p>22 about the alleged lack of volatility in</p> <p>23 Mr. Madoff's funds wasn't a red flag, wasn't</p> <p>24 something to be concerned about, wasn't</p> <p>25 something that would drive you to take your</p>	<p style="text-align: right;">607</p> <p>1 - Merkin - Cross - Confidential</p> <p>2 A. I'll just read the whole first</p> <p>3 paragraph: "As usual, reviewed the strategy.</p> <p>4 Same basic concepts, referring back to the</p> <p>5 Trading Directive." In initial caps. "(Check</p> <p>6 copy in file). Number of stocks expands.</p> <p>7 Market volatility up. Choppiness helps returns.</p> <p>8 Volatility of our own returns higher, daily,</p> <p>9 intra-daily (we don't see the intra-daily)</p> <p>10 weekly, less. Monthly, more subdued. Pulled</p> <p>11 out the sheets and reviewed with him."</p> <p>12 Q. And in addition to the fact that you</p> <p>13 saw the daily volatility and the weekly</p> <p>14 volatility, when you discussed this issue with</p> <p>15 Mr. Madoff, what other facts and factors gave</p> <p>16 you comfort that his performance was nothing</p> <p>17 that alarmed you?</p> <p>18 A. I had spent a fair amount of time</p> <p>19 over the years looking at the performance of</p> <p>20 other managers. Overwhelmingly because I chair</p> <p>21 two very large endowment investment committees,</p> <p>22 one for the school, the university, and one for</p> <p>23 UJA Federation of New York. One for 16 years,</p> <p>24 and one for about 10 years.</p> <p>25 And given annual spending</p>
<p style="text-align: right;">606</p> <p>1 - Merkin - Cross - Confidential</p> <p>2 money out of the fund?</p> <p>3 A. As an observation, it is certainly</p> <p>4 not one I ignored. It was certainly one I</p> <p>5 considered and thought about, examined and</p> <p>6 talked to Mr. Madoff about.</p> <p>7 But it starts with the basic premise</p> <p>8 that Mr. Madoff's volatility wasn't what people</p> <p>9 thought was on anything sort of a near-term</p> <p>10 basis.</p> <p>11 Again, we were posting trades and</p> <p>12 creating a daily report of our Madoff P&L, and</p> <p>13 the volatility there on a daily basis was up,</p> <p>14 down, in significant -- significantly higher</p> <p>15 volatility than one may have observed if one</p> <p>16 looked at much longer reporting periods. Weekly</p> <p>17 volatility was high, monthly volatility was a</p> <p>18 lot lower, and quarterly volatility was a lot</p> <p>19 lower still.</p> <p>20 In addition to that --</p> <p>21 Q. Just stay with that for one moment.</p> <p>22 Can we look at Exhibit 333.</p> <p>23 And could you read into the record</p> <p>24 the entry in your November 2006 note about</p> <p>25 volatility of returns in the first paragraph.</p>	<p style="text-align: right;">608</p> <p>1 - Merkin - Cross - Confidential</p> <p>2 requirements of both institutions that were a</p> <p>3 percentage of their endowments, lower volatility</p> <p>4 money management strategies were broadly of</p> <p>5 interest to me.</p> <p>6 And this is partly in answer to the</p> <p>7 question you asked me before, what did you talk</p> <p>8 about.</p> <p>9 THE CHAIRMAN: Right.</p> <p>10 A. Well, I talked about money</p> <p>11 management strategies, and in some cases, with</p> <p>12 some people and in some times, would have</p> <p>13 focused on volatility-adjusted returns.</p> <p>14 So there were a number of funds and</p> <p>15 a number of fund managers whom I had been</p> <p>16 interested in who had come to the office and</p> <p>17 discussed what they were doing, and in making</p> <p>18 presentations to the committees that I chaired,</p> <p>19 that exhibited volatility characteristics,</p> <p>20 worldly in keeping with Mr. Madoff's, and at</p> <p>21 levels of returns that were in some cases</p> <p>22 substantially higher.</p> <p>23 Q. Can you give us the names of some of</p> <p>24 those money managers that you're talking about?</p> <p>25 A. Some that came to mind the other day</p>

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 2 when Mr. Bamberger asked me something about that
 3 were Elliott Associates, the Paul Singer
 4 Millennium, the fund run by Israel Englander.
 5 SAC. That's Steve Cohen's fund.
 6 Certainly anything that Jim Simons
 7 had been doing at Medallion over the years had
 8 extraordinary returns and extraordinarily low
 9 volatility. Black box it might have been.
 10 With all these funds, certainly for
 11 the periods of time we're talking about, one had
 12 a great deal less transparency than one had with
 13 Mr. Madoff.
 14 THE CHAIRMAN: Which one thought you
 15 had with Mr. Madoff.
 16 THE WITNESS: Correct.
 17 Q. In addition to the names you've
 18 mentioned, were there other managers that you
 19 were familiar with? And can you tell us a
 20 little bit about their results as compared to
 21 Mr. Madoff?
 22 How about Soros?
 23 A. Soros was in the investing business,
 24 not so much in the trading business. Soros had
 25 a 17-year track record of up years with very,

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 2 of the funds we talked about. They had a very
 3 low volatility return. I'm not quite sure I
 4 knew what they were doing.
 5 THE CHAIRMAN: Reference was made
 6 throughout your testimony to black box.
 7 For the record, can you define what that
 8 means?
 9 THE WITNESS: Well, let's take
 10 either D.E. Shaw or Jim Simons.
 11 Jim Simons ran an operation called
 12 Medallion for many, many, years. Had
 13 absolutely extraordinary returns, possibly
 14 compounding in the high 30's. And I may be
 15 a little bit off there, and I may be a bit
 16 low. With -- and that's net, after very
 17 high fee structures, with almost no trace
 18 of at least monthly volatility.
 19 However, if you then said, fine,
 20 what do I own, where was my transparency, I
 21 would, for the sake of these conversations,
 22 combine and contrast transparency and black
 23 box.
 24 So to the extent one had no
 25 transparency, one was investing in a black

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 2 very low volatility, and was able to handle
 3 significant increases in the size of capital
 4 over the period of those years in ways that
 5 produced a very steady and very attractive
 6 return.
 7 Q. Do you know an entity called
 8 Baupost?
 9 A. Baupost is a fund that's based up in
 10 Boston. It's run by a gentleman whose name is
 11 Seth Klarman, who produced possibly better
 12 returns over a period of years and had very low
 13 volatility.
 14 Q. What about Tudor?
 15 A. Tudor, they were two sets of funds
 16 there. One -- one was a Tudor futures fund, one
 17 was more an equity fund, almost alone among
 18 futures managers, able to squeeze volatility
 19 down, and was interested in a low volatility
 20 return.
 21 Q. And they were successful?
 22 A. Yes.
 23 Q. What about D.E. Shaw?
 24 A. I know less about them. They were
 25 much more of a black box, for example, than some

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 2 box. And to the extent that one was
 3 investing in a black box, one had no
 4 transparency.
 5 THE CHAIRMAN: And as far as you
 6 were concerned, Mr. Madoff had full
 7 transparency daily?
 8 THE WITNESS: Yes.
 9 I missed --
 10 THE CHAIRMAN: He had full
 11 transparency daily?
 12 THE WITNESS: Let's understand what
 13 transparency meant in Mr. Madoff's case.
 14 Transparency meant you received
 15 every confirmation and you received the
 16 monthly. If there was no activity that
 17 day, there was nothing to report. So what
 18 we had on that day was our report that we
 19 prepared internally.
 20 There were many, many, many days
 21 when we received nothing from Mr. Madoff.
 22 THE CHAIRMAN: Thank you.
 23 BY MR. LEVANDER:
 24 Q. I'm going to ask you one more
 25 question and then I'm going to send you home for